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January 24, 2002

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 00-96, *In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*

Dear Ms. Salas:

This morning our office received a call from the ECFS Help Desk that the Comments of Joint Broadcasters filed electronically and served yesterday in the above-captioned docket in support of an Emergency Petition of the National Association of Broadcasters and the Association of Local Television Stations (*see* DA 02-31) could not be processed due to a formatting problem. We are therefore electronically resubmitting the identical pleading filed yesterday, with the formatting problem removed, so that it may be posted on the ECFS system. Pursuant to my discussion with Ben Bartolome of the Cable Services Bureau, because we are resubmitting the identical document, the Cable Bureau will treat these comments as timely filed. We apologize for any inconvenience this may have caused.

Sincerely,

/s/ Amy L. Levine

Attachment

cc: Ben Bartolome, Cable Services Bureau

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Satellite Home Viewer Improvement Act of 1999)	CS Docket No. 00-96
)	
Broadcast Signal Carriage Issues)	

To: The Commission

COMMENTS OF JOINT BROADCASTERS

In 1999, Congress enacted the Satellite Home Viewer Improvement Act¹ to “allow[] satellite carriers for the first time to provide their subscribers with the television stations they want most: their local stations”² and to protect local broadcasters “from the harmful effects of satellite cherry picking.”³ Since that time, satellite carriers have launched a number of unsuccessful battles to avoid carrying all local stations and to be able to carry only the few that they prefer.⁴ Today, satellite carrier EchoStar is giving second class treatment to smaller stations, public stations, and foreign language stations – what it terms “less popular” local

¹ Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 (1999).

² H. Conf. Rep. No. 106-464, at 93 (1999).

³ *Satellite B’casting & Communications Ass’n v. FCC*, No. 01-1271, 2001 WL 1557809, at *13 (4th Cir. Dec. 7, 2001); *see* H. Conf. Rep. No. 106-464, at 101 (1999) (explaining that SHVIA “prevent[s] satellite carriers from choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas”).

⁴ *See Satellite B’casting & Communications Ass’n v. FCC*, No. 01-1271, 2001 WL 1557809 (4th Cir. Dec. 7, 2001) (rejecting a constitutional challenge to the SHVIA carriage requirement); *Satellite B’casting & Communications Ass’n of America v. FCC*, 146 F. Supp. 2d 803 (E.D. Va. 2001) (same); *In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Order on Reconsideration, CS Docket No. 00-96, FCC 01-249, ¶¶ 40, 48 (2001) (emphasis added) (“*Reconsideration Order*”) (upholding requirement that satellite carriers cannot force subscribers to purchase additional equipment to receive some stations in a market but not others and clarifying that carriers may not offer packages consisting of some local stations but not others).

stations – by relegating them to a separate dish that subscribers must go to the added hassle (and delay) to acquire, though not pay for. This is the kind of discriminatory treatment that SHVIA was intended to prevent, and the Commission should move quickly to quash it. In order to ensure that satellite subscribers are able to receive all local stations, Arizona State University; Benedek Broadcasting Corporation; Draper Communications, Inc.; and LIN Television Corporation (collectively, “Joint Broadcasters”),⁵ submit these comments in support of the Emergency Petition of National Association of Broadcasters (“NAB”) and Association of Local Television Stations (“ALTV”) to Modify or Clarify Rule, filed January 4, 2002, asking for modification or clarification and immediate relief with respect to satellite carrier EchoStar’s requiring subscribers to obtain a second satellite dish antenna to receive some local stations in a market but not others.⁶

I. ECHOSTAR’S SECOND DISH REQUIREMENT VIOLATES SHVIA’S NONDISCRIMINATION PROVISION

When Congress adopted SHVIA, its intent was to prevent satellite carriers from cherry-picking certain stations in a local market, and the Commission’s rules are replete with regulations that carry out that intent by placing all local broadcasters on equal footing. For example, satellite carriers must carry every local station in a market that requests carriage,⁷ must place local stations on continuous channels,⁸ and cannot offer packages containing some local

⁵ The stations represented by these groups are listed in Attachment A.

⁶ Emergency Petition of National Association of Broadcasters and Association of Local Television Stations to Modify or Clarify Rule in CS Docket No. 00-96 (Jan. 4, 2002) (“Emergency Petition”).

⁷ See 47 U.S.C. § 338(a)(1); 47 C.F.R. § 76.66(b)(1).

⁸ See 47 U.S.C. § 338(d); 47 C.F.R. § 76.66(i)(1).

stations but not others.⁹ It therefore comes as no surprise that when the Commission implemented SHVIA, it prohibited satellite providers from carrying local stations “in a manner which requires subscribers to obtain additional equipment at their own expense.”¹⁰ Keeping all local stations on a single dish, so that a subscriber either needs no extra equipment to receive any local station or must obtain additional equipment to receive every local station, is consistent with the level playing field created by the Act.

In December 2001, satellite carrier EchoStar revealed that it would be dividing local stations between two dishes, with “the most popular [local] channels available” on the main dish, while “if the customer wants the less popular channels, they will need a second dish.”¹¹ EchoStar disclosed this arrangement only a couple of weeks before the SHVIA carriage requirements became effective, even though EchoStar knew months before that its channel capacity could not accommodate all of the stations it would need to carry.¹² EchoStar must therefore have known that it would be placing certain stations on a second dish long before it revealed its offer. EchoStar claims that this arrangement is consistent with the Commission’s

⁹ See Reconsideration Order ¶ 48.

¹⁰ 47 C.F.R. § 76.66(i)(4); see also *In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, Report and Order, 16 FCC Rcd 1918, ¶ 44 (2000) (“SHVIA Order”). The Commission later stated that “requiring subscribers to *obtain* a separate dish to receive some local signals when other local signals are available without the separate dish is necessary to give full effect to local station carriage requirements.” Reconsideration Order ¶ 41 (emphasis added).

¹¹ *EchoStar Subs Will Need Second Dish for Some New Local Stations*, Satellite Business News Fax Update (Dec. 17, 2001) (quoting EchoStar Executive Vice President Jim DeFranco).

¹² The Commission’s rules required stations to make their carriage election requests six months earlier, by July 1, 2001. See 47 C.F.R. § 76.66(c)(3).

rules because EchoStar will give subscribers the second dish for free.¹³ However, such a plan is permitted by neither the letter nor the spirit of SHVIA.

II. ECHOSTAR'S DISINGENUOUS IMPLEMENTATION OF THE SECOND DISH OFFER DEMONSTRATES THAT THE ARRANGEMENT IS NOT BONA FIDE

Joint Broadcasters fully concur with NAB and ALTV that “EchoStar views the provision of a free second dish to subscribers as a burdensome duty that it will avoid carrying out if at all possible.”¹⁴ The deficiencies in the way that EchoStar has approached other obligations under SHVIA underscore the defects of its dual dish approach – EchoStar is once again demonstrating its inability to comply with the terms of the statute by implementing its second dish “offer” in a way that limits the second dish’s availability to consumers. This was not what the Commission intended when it prohibited satellite carriers from discriminating against stations. EchoStar’s recalcitrance, however, should come as no surprise to the Commission, given the company’s efforts to skirt SHVIA at every turn.¹⁵

¹³ See *EchoStar Statement on NAB Petition* (Jan. 7, 2002), available at <http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=243419>.

¹⁴ Emergency Petition at 9. Joint Broadcasters agree that “the Commission should communicate to the DBS industry that to comply even with EchoStar’s reading of the current FCC rules, (1) the offer of a free second dish must be prominently communicated both to existing customers and to new customers via the carrier’s web site and otherwise, (2) any such offer must include *all* out-of-pocket costs of purchasing, installing, and hooking up the second dish and any other necessary equipment, (3) the installation must be prompt, and (4) there can be no preconditions for the offer.” *Id.* at 12.

¹⁵ For example, EchoStar initially used a form letter to deny virtually every carriage election request it received from stations on grounds of failure to prove delivery of a good quality signal, even stations that put city-grade coverage over EchoStar’s local receive facility site. The Commission rejected this approach outright, finding it “not consistent with the SHVIA or our rules to attempt to place the burden on the broadcast station to prove why it is entitled to carriage in the absence of a legitimate reason for questioning its eligibility.” Reconsideration Order ¶ 61.

A. EchoStar Is Making It Difficult For Subscribers To Acquire A Second Dish

EchoStar is making it exceedingly difficult for subscribers to obtain a “free” second dish by refusing to publicize the second dish arrangement, even among its own customer service representatives, and by making it burdensome for those subscribers who do find out about the offer to have a second dish installed. In the Emergency Petition, NAB and ALTV observed that as of January 3, 2002, EchoStar’s website made no mention of the second dish offer. As of January 23, twenty-two days after the SHVIA deadline, nineteen days after NAB and ALTV filed the Emergency Petition, and fifteen days after the Commission placed the Emergency Petition on public notice, EchoStar’s website still includes no mention of the offer. A visitor to EchoStar’s website who clicks on the local station page to see which local channels are available in a particular market will see that some channels are “Available On DISH 500,” while for others, a “Second Dish [is] Required.”¹⁶ A consumer reading “Second Dish Required” would reasonably assume that she would need to purchase or rent an additional dish to receive the stations. There is no reason for a subscriber to conclude, absent some indicator from EchoStar, that the required second dish is available for no charge.

EchoStar also makes no mention of the second dish offer at other places on its website where a consumer interested in finding out more about the second dish would be likely to look. It does not appear on the Frequently Asked Questions page,¹⁷ nor is it mentioned in the

¹⁶ See, e.g., <<http://www.dishnetwork.com/content/programming/locals/package/index.asp?viewby=2&packid=17&sortby=1>> (listing New York local channels); <<http://www.dishnetwork.com/content/programming/locals/package/index.asp?viewby=2&packid=14&sortby=1>> (listing Los Angeles local channels); <<http://www.dishnetwork.com/content/programming/locals/package/index.asp?viewby=2&packid=22&sortby=1>> (listing Washington, D.C. local channels).

¹⁷ See <<http://faq.dishnetwork.com/search/results/index.asp>>.

section of the website where EchoStar describes the equipment used to access its service.¹⁸ In short, EchoStar has not made readily available to consumers *any* information about the second dish offer on its website, a place where subscribers and potential subscribers go to obtain more information about EchoStar's services.

As NAB and ALTV detail in the Emergency Petition, consumers who do find out about EchoStar's second dish offer and decide to obtain a dish must jump through a number hoops to have a dish installed.¹⁹ Although the second dish is technically "free," EchoStar requires professional installation, which means that a subscriber must arrange to be available for the entirety of the five hour window EchoStar schedules when it books an installation appointment.²⁰ Subscribers have also reported that EchoStar's customer service representatives are not knowledgeable about the offer, that installations often are not scheduled in a timely manner, and that EchoStar will provide only one receiver capable of processing signals from the

¹⁸ See <<http://www.dishnetwork.com/content/technology/index.shtml>>.

¹⁹ See Emergency Petition at 10-11. As explained in the Emergency Petition, the hassles and inconveniences associated with acquiring a second dish are a strong deterrent. Consumers must know about the second dish offer, know enough about the programming on stations on the second dish to want to obtain a dish, contact EchoStar to arrange for installation and arrange to be home for the installer, and be willing to accept the aesthetic cost of having a second dish on their homes, assuming there are no physical or legal impediments to installing a second dish. See *id.* at 7-8.

²⁰ See <http://groups.google.com/groups?hl=en&threadm=47e18.48029%24Zh1.9114023%40news02.optonline.net&rnum=1&prev=/groups%3Fq%3DDean%2BKoska%2Bgroup:alt.dbs.echostar.*%2Bgroup:alt.dbs.echostar.*%26hl%3Den%26selm%3D47e18.48029%2524Zh1.9114023%2540news02.optonline.net%26rnum%3D1> ("I called today to get my free second dish, but I couldn't get them to just send the equipment. They said I had to have it professionally [sic] installed. Now I have to take half day off work.") (posted by Dean Koska on Jan. 9, 2002); <http://groups.google.com/groups?hl=en&threadm=47e18.48029%24Zh1.9114023%40news02.optonline.net&rnum=1&prev=/groups%3Fq%3DDean%2BKoska%2Bgroup:alt.dbs.echostar.*%2Bgroup:alt.dbs.echostar.*%26hl%3Den%26selm%3D47e18.48029%2524Zh1.9114023%2540news02.optonline.net%26rnum%3D1> ("Although it's free, it's still taking my time to wait for the installation guy to arrive and the time he needs to do the install.") (posted by Joe on Jan. 7, 2002).

second dish, even if the consumer has more than one receiver in his home.²¹ In sum, EchoStar's second dish offer, particularly as it is being implemented, is far from complying with SHVIA's nondiscrimination requirement.

B. Subscribers Are Reluctant To Obtain And Use Additional Equipment To Access Local Stations

Even if EchoStar were publicizing the second dish arrangement to subscribers and were making it convenient to obtain a second dish, many subscribers would not take EchoStar up on its offer. When Congress adopted the cable carriage requirements in 1992, it did so in part because it recognized that consumers would not use A/B switches to alternate between video programming delivered via cable and broadcast programming delivered over the air and that leaving them no other option but to do so was not in the public interest.²² The SHVIA carriage requirement was premised on a similar rationale, one endorsed by the Fourth Circuit when it upheld the statute less than two months ago.²³ In fact, the satellite carriers themselves recognized this problem, testifying before Congress that they needed to be allowed to carry local

²¹ See, e.g., < <http://groups.google.com/groups?hl=en&threadm=x2r28.12156%24B21.1817753%40news1.rdc1.fl.home.com&prev=/groups%3Fnum%3D25%26hl%3Den%26group%3Dalt.dbs.echostar%26start%3D125%26group%3Dalt.dbs.echostar> > (reporting that a customer service representative “just said that [EchoStar] is no longer giving away free dishes”) (posted by Walter on Jan. 19, 2002); see also Emergency Petition at 10-11.

²² See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(18), 106 Stat. 1460, 1462 (1992) (stating that “the ‘A/B’ input selector antenna system, is not an enduring or feasible method of distribution, and is not in the public interest”); H. Rep. No. 102-628, at 54 (1992) (providing survey results demonstrating that consumers are not willing to use A/B switches); S. Rep. No. 102-92, at 45 (1991) (explaining that consumers do not use A/B switches and concluding that “[t]he technical and economic complexities involved with an A/B switch make it an unworkable solution”).

²³ See H. Conf. Rep. No. 106-464, at 102 (recognizing the unlikelihood “that subscribers who receive network signals and hundreds of other programming choices from their satellite carrier will undertake such trouble and expense to obtain over-the-air signals from independent broadcast stations”); *Satellite B’casting & Communications Ass’n v. FCC*, No. 01-1271, 2001 WL 1557809, at *17 (4th Cir. Dec. 7, 2001).

stations because consumers were not willing to receive national video programming via satellite and local programming via cable or over the air.²⁴ Thus, even if EchoStar were implementing its second dish offer in a manner that reduced its discriminatory impact, many subscribers would not receive the “less popular” stations relegated to the second dish. The result would be the same cherry-picking by satellite carriers of certain local stations that Congress sought to prevent by adopting the statute. To avoid this result – already determined by Congress to be contrary to the public interest – the Commission should therefore adopt the rule clarification urged by NAB and ALTV.

III. CONCLUSION

In order to treat all local stations equally, as Congress intended, and to prevent discrimination against “less popular” stations, the Commission should clarify (1) that a satellite carrier cannot require subscribers to obtain a second dish to receive some stations in a market but not others, and (2) that EchoStar’s second dish plan does not meet the requirements of SHVIA for nondiscriminatory treatment.

²⁴ See, e.g., *H.R. 2921 & H.R. 3210, Video Competition: Multichannel Programming: Hearing Before the Telecommunications, Trade, and Consumer Protection Subcomm. of the House Commerce Comm.*, 105th Cong. 26 (1998) (prepared statement of Charles W. Ergen, Chief Executive Officer, EchoStar Communications Corp.) (explaining that 80% of interested consumers reject satellite programming because they cannot receive local stations via satellite); *Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (Part II): Hearing Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 105th Cong. 8 (1998) (prepared statement of Charles W. Ergen, Chief Executive Officer, EchoStar Communications Corp.) (same).

Respectfully submitted,

/s/ Jonathan D. Blake

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January 23, 2002

ATTACHMENT A
Stations Represented by Broadcast Groups

Arizona State University

KAET(TV), Tempe, AZ

Benedek Broadcasting Corporation

KAKE-TV, Wichita, KS

KAUZ-TV, Wichita Falls, TX

KDLH(TV), Duluth, MN

KGWC-TV, Casper, WY

KGWL-TV, Lander, WY

KGWN-TV, Cheyenne, WY

KGWR-TV, Rock Springs, WY

KHQA-TV, Hannibal, MO

KKTV(TV), Colorado Springs, CO

KLBY(TV), Colby, KS

KMIZ(TV), Columbia, MO

KSTF(TV), Scottsbluff, NE

KUPK-TV, Wichita, KS

WBKO(TV), Bowling Green, KY

WHOI(TV), Creve Coeur, IL

WHSV-TV, Harrisonburg, VA

WIBW-TV, Topeka, KS

WIFR(TV), Rockford, IL

WILX-TV, Lansing, MI

WMTV(TV), Madison, WI

WOWT(TV), Omaha, NE

WSAW-TV, Wausau, WI

WTAP-TV, Parkersburg, WV

WTOK-TV, Meridian, MS

WTRF-TV, Wheeling, WV

WTVY-TV, Dothan, AL

WYTV(TV), Youngstown, OH

Draper Communications, Inc.

WBOC-TV, Salisbury, MD

LIN Television Corporation

Owned by LIN:

KXAN-TV, Austin, TX

KXAM-TV, Llano, TX

WANE-TV, Fort Wayne, IN

WAPA-TV, San Juan, PR

WAVY-TV, Portsmouth, VA

WISH-TV, Indianapolis, IN

WIVB-TV, Buffalo, NY

WJPX(TV), San Juan, PR

WJWN-TV, San Sebastian, PR

WKPV(TV), Ponce, PR

WLFI-TV, West Lafayette, IN

WNAC-TV, East Providence, RI

WNJX-TV, Mayaguez, PR

WNLO(TV), Buffalo, NY

WOOD-TV, Grand Rapids, MI

WTNH-TV, New Haven, CT

WWLP(TV), Springfield, MA

Operated by LIN Pursuant to LMA:

KNVA(TV), Austin, TX

WCTX(TV), New Haven, CT

WOTV(TV), Battle Creek, MI

WTIN, Ponce, PR

WVBT, Virginia Beach, VA

CERTIFICATE OF SERVICE

I, Amy L. Levine, hereby certify that on this 23rd day of January, 2002, I caused copies of the foregoing Comments of Joint Broadcasters to be delivered by U.S. First Class Mail, postage prepaid, to:

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/s/ Amy L. Levine

I further certify that a copy of the aforesaid document also was delivered by electronic mail to:

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